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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Wells Fargo Bank NA,  
10 Plaintiff,

11 v.

12 Ferruccio Insurance Services of LA  
13 Incorporated, et al.,  
14 Defendants.

No. CV-17-02492-PHX-SMB

**ORDER**

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16 Pursuant to Fed. R. Civ. P. 56, Plaintiff Wells Fargo Bank, N.A. (“Wells Fargo”)   
17 filed a Motion For Summary Judgment as to Defendant Ferruccio Insurance Services of   
18 L.A. doing business as PenbenLA (“Ferruccio”) as to Count One only. Oral argument was   
19 held on January 11, 2019. The Court has now considered the Motion (Doc. 54, Mot.),   
20 Response (Doc. 60, Resp.), and Reply (Doc. 65, Reply) along with arguments of counsel   
21 and relevant case law.

22 **I. BACKGROUND**

23 **A. Factual Background**

24 The following undisputed facts providing relevant background are drawn from the   
25 parties’ statements of fact and other parts of the record.

26 Defendant Equa Gaming, an Arizona general partnership, opened a business   
27 account ending in 4583 at Wells Fargo (the “Account”) on or about August 28, 2009.   
28 Defendants Victor Carillo and Dana M. Brannan signed the application for the Account.

1 On March 12, 2016, Defendant Ferruccio, under the name PenbenLA, issued a check  
2 drawn upon Pacific Western Bank made payable to Equa Gaming in the Amount of  
3 \$100,000 (the “Check”). An employee of Ferruccio deposited the Check directly into the  
4 Account at a Wells Fargo branch on March 12, 2016, a Saturday. The Check bore no  
5 apparent evidence of forgery or alteration. On March 14, 2016, the Check was posted to  
6 the Account and the funds became available for withdrawal. Between March 14 and 16,  
7 various debits and withdrawals were made from the Account. After the Check was  
8 deposited, Ferruccio directed Pacific Western Bank to stop payment on the Check, and the  
9 Check was returned unpaid to Wells Fargo on March 16, 2016. Wells Fargo reversed the  
10 \$100,000 credit, which caused the Account to become overdrawn.

11 In addition to the undisputed facts above, Ferruccio asserts the following facts.  
12 During the period of March 11–12, 2016, Michael Hand, President of Ferruccio,  
13 communicated with Carrillo regarding the payment of \$100,000 to be made to Equa  
14 Gaming, and that the payment was initially to be made by check. After arranging for the  
15 deposit of the Check to the Account, Carillo informed Hand that the funds would not be  
16 available immediately, and because time was of the essence, Hand agreed to wire the funds  
17 to the Account, which he subsequently did. Ferruccio further contends that during the  
18 discussions, Carillo and Hand agreed that a stop payment would be put on the Check.

### 19 **B. Procedural Background**

20 Wells Fargo initiated this action on July 26, 2017 (Doc. 1), filed a first amended  
21 complaint on August 14, 2017 (Doc. 17), and a second amended complaint on September  
22 17, 2018 (Doc. 68, SAC), bringing claims against Ferruccio Insurance Services of L.A.,  
23 Inc. doing business as PenbenLA (“Ferruccio”), Equa Gaming, Victor Carillo, Dana M.  
24 Brannan, and Does I-X. Of the various claims brought by Wells Fargo, one was brought  
25 against Ferruccio for enforcement of the Check (“Count One”) pursuant to A.R.S. Title 47  
26 (codifying the Uniform Commercial Code).<sup>1</sup> Ferruccio filed an answer on November 2,

27  
28 <sup>1</sup> Wells Fargo asserts that Arizona is the applicable law; in any event, Nevada and California have both also adopted Article 3 of the U.C.C. Accordingly, citations herein are to the U.C.C.

1 2018 (Doc. 75, Ans.), and Wells Fargo now moves for summary judgment against  
2 Ferruccio on Count One.

## 3 **II. LEGAL STANDARD FOR SUMMARY JUDGMENT**

4 Summary judgment is appropriate when “there is no genuine dispute as to any  
5 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
6 56(a). A material fact is any factual issue that might affect the outcome of the case under  
7 the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).  
8 A dispute about a fact is “genuine” if the evidence is such that a reasonable jury could  
9 return a verdict for the nonmoving party. *Id.*

10 “A party asserting that a fact cannot be or is genuinely disputed must support the  
11 assertion by . . . citing to particular parts of materials in the record” or by “showing that  
12 materials cited do not establish the absence or presence of a genuine dispute, or that an  
13 adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P.  
14 56(c)(1)(A), (B). The court need only consider the cited materials, but it may also consider  
15 any other materials in the record. *Id.* 56(c)(3). Summary judgment may also be entered  
16 “against a party who fails to make a showing sufficient to establish the existence of an  
17 element essential to that party’s case, and on which that party will bear the burden of proof  
18 at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

19 Initially, the movant bears the burden of demonstrating to the Court the basis for the  
20 motion and “identifying those portions of [the record] which it believes demonstrate the  
21 absence of a genuine issue of material fact.” *Id.* at 323. If the movant fails to carry its  
22 initial burden, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co.*  
23 *v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). If the movant meets its initial  
24 responsibility, the burden then shifts to the nonmovant to establish the existence of a  
25 genuine issue of material fact. *Id.* at 1103. The nonmovant need not establish a material  
26 issue of fact conclusively in its favor, but it “must do more than simply show that there is  
27 some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith*  
28 *Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmovant’s bare assertions, standing alone,

1 are insufficient to create a material issue of fact and defeat a motion for summary judgment.  
2 *Liberty Lobby*, 477 U.S. at 247–48. “If the evidence is merely colorable, or is not  
3 significantly probative, summary judgment may be granted.” *Id.* at 249–50 (citations  
4 omitted). However, in the summary judgment context, the Court believes the nonmovant’s  
5 evidence, *id.* at 255, and construes all disputed facts in the light most favorable to the non-  
6 moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004). If “the evidence  
7 yields conflicting inferences [regarding material facts], summary judgment is improper,  
8 and the action must proceed to trial.” *O’Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139,  
9 1150 (9th Cir. 2002).

### 10 **III. ANALYSIS**

11 Wells Fargo asserts that it has proved a *prima facie* case against Ferruccio, needing  
12 “only to prove that the signatures on the Check were authorized and that it is a holder in  
13 possession of the instrument.” (Mot. at 3). In support of this, Wells Fargo further asserts  
14 that Ferruccio “admits that the signatures are authorized.” (Mot. at 4) (citing Ans. at ¶¶ 14,  
15 15, 35, 39, 42, 43).

16 Ferruccio does not argue that the signatures were not authorized or that Wells Fargo  
17 is not a holder in possession of the instrument. Rather, Ferruccio argues that it is not liable  
18 to make payment on the check because of a defense—an agreement between Ferruccio and  
19 Carrillo that the check “was not to be deposited and another method of payment would be  
20 pursued.”<sup>2</sup> (Resp. at 3–4).

21 Wells Fargo also asserts that even if Ferruccio has a valid defense, Wells Fargo is  
22 a holder in due course who took the Check without notice of any defenses or claims, which  
23 would limit any defenses proved by Ferruccio. (Mot. at 5–8). Ferruccio contends that  
24 Wells Fargo “is not a holder in due course” because Wells Fargo “did not exercise  
25 reasonable commercial standards of fair dealing.” (Resp. at 4).

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28 <sup>2</sup> While Ferruccio asserts that it was clear that the check “was not to be deposited,” this  
contradicts the prior statement made in the same filing. (Resp. at 3) (noting that Carrillo  
responded by e-mail regarding the wire “[a]fter making the deposit”).

1 Ferruccio also argues that “[a]ny existing security interest claimed by [Wells Fargo]  
2 is limited to the amount of Check, less any rightful set-offs and deductions,” and that Wells  
3 Fargo’s security interest cannot exceed \$75,278.39, the amount that the account was  
4 overdrawn. (Reply at 5–6).

5 **A. Legal Standard**

6 When “an unaccepted draft is dishonored, the drawer is obliged to pay the draft . . .  
7 according to its terms at the time it was issued . . . to a person entitled to enforce the  
8 draft [].” U.C.C. § 3-414(b). A “person entitled to enforce” an instrument includes “the  
9 holder of an instrument.” U.C.C. § 3-301. “If a customer delivers an item to a depositary  
10 bank for collection . . . the depositary bank becomes a holder of the item . . . if the customer  
11 at the time of delivery was a holder of the item, whether or not the customer indorses the  
12 item [].” U.C.C. § 4-205. “Depositary banks can be holders in due course of unendorsed  
13 checks if the payee is its customer.” *Conder v. Union Planters Bank, N.A.*, 384 F.3d 397,  
14 400 (7th Cir. 2004).

15 In an action brought with respect to an instrument where the validity of signatures  
16 is admitted or proved, “a plaintiff producing the instrument is entitled to payment if the  
17 plaintiff proves entitlement to enforce the instrument under Section 3-301, unless the  
18 defendant proves a defense or claim in recoupment.” U.C.C. § 3-308. One such defense a  
19 party may raise is that their obligation to pay the instrument was “modified, supplemented,  
20 or nullified by a separate agreement of the obligor and a person entitled to enforce the  
21 instrument, if the instrument is issued or the obligation is incurred in reliance on the  
22 agreement or as part of the same transaction giving rise to the agreement.” U.C.C. § 3-117;  
23 *see also* § 3-305(a)(2) (“[T]he right to enforce the obligation of a party to pay an instrument  
24 is subject to . . . a defense of the obligor stated in another section of this Article[.]”).

25 However, “[t]he right of a *holder in due course* to enforce the obligation of a party  
26 to pay the instrument” is subject only to a limited list of defenses. U.C.C. § 3-305(b)  
27 (emphasis added). The rights of a holder in due course are not subject to the defense found  
28 in U.C.C. § 3-117.

1           **B. Prima Facie Case**

2           1. Plaintiff is Entitled to Enforce The Check

3           No party has disputed that the signature on the Check was authorized. In order to  
4           enforce the Check, Wells Fargo therefore needs to show that it is a holder of the instrument.  
5           It is undisputed that the Check payable to Equa Gaming was deposited by Ferruccio  
6           directly into Equa Gaming's account with Wells Fargo. There is therefore no dispute as to  
7           material facts affecting whether Wells Fargo is a holder of the Check. Upon receipt of the  
8           Check, Wells Fargo became a holder of the Check due to its status as the depository bank.  
9           Accordingly, Wells Fargo is entitled to enforce the Check, unless Ferruccio proves a  
10          defense.

11          2. Ferruccio's Defense Fails

12          In support of its stated defense, Ferruccio cites to U.C.C. § 3-117 which states as  
13          follows:

14                   Subject to applicable law regarding exclusion of proof of  
15                   contemporaneous or previous agreements, the obligation of a  
16                   party to an instrument to pay the instrument may be modified,  
17                   supplemented, or nullified by a separate agreement of the  
18                   obligor and a person entitled to enforce the instrument, if the  
19                   instrument is issued or the obligation is incurred in reliance on  
20                   the agreement or as part of the same transaction giving rise to  
21                   the agreement. To the extent an obligation is modified,  
22                   supplemented, or nullified by an agreement under this section,  
23                   the agreement is a defense to the obligation.

24          Wells Fargo argues that because Carrillo "was not the person entitled to enforce the  
25          instrument, the agreement with him is not a defense to payment of the Check." (Reply  
26          at 3).

27          According to U.C.C. § 3-301, a person entitled to enforce an instrument means one  
28          of three things: (1) the holder of the instrument, (2) a nonholder in possession of the  
instrument who has the rights of a holder, or (3) a person not in possession of the instrument  
who is entitled to enforce the instrument pursuant to U.C.C. § 3-309 or § 3-418(d). In order  
to be a "holder," the person must be in possession of the instrument. U.C.C.

1 § 1-201(b)(21). Neither Ferruccio nor Wells Fargo contend that Carrillo was in possession  
2 of the instrument, or that Carrillo was a holder pursuant to U.C.C. § 3-309, which pertains  
3 to lost, destroyed, or stolen instruments, or U.C.C. § 3-418(d), which pertains to mistake.  
4 Given that none of these three categories apply to Carrillo, he cannot be “a person entitled  
5 to enforce an instrument” in this case. The U.C.C. provides that Wells Fargo became the  
6 holder of the check at the time it received the check for deposit. *See* U.C.C. § 4-205.

7 Any separate agreement made between Ferruccio and Carrillo is therefore not a  
8 defense to Ferruccio’s obligation to pay the Check. Because there are no disputed facts as  
9 to whether Wells Fargo is a holder entitled to enforce the instrument or whether Ferruccio  
10 has a valid defense, Wells Fargo has shown that it prevails on Count One.

### 11 **C. Holder in Due Course**

12 As the Court has determined that Plaintiff is entitled to enforce the Check, and that  
13 Ferruccio’s defense fails as a matter of law, the Court need not address whether Wells  
14 Fargo is a holder in due course. *See* U.C.C. § 3-308 cmt. 2 (“Until proof of a defense . . .  
15 is made, the issue as to whether the plaintiff has rights of a holder in due course does not  
16 arise.”). The Court will address the issue anyway in an effort to be complete.

17 A holder of an instrument becomes a “holder in due course” if

18 (1) the instrument when issued or negotiated to the holder does  
19 not bear such apparent evidence of forgery or alteration or is  
20 not otherwise so irregular or incomplete as to call into question  
its authenticity; and

21 (2) the holder took the instrument

22 (i) for value,

23 (ii) in good faith,

24 (iii) without notice that the instrument is overdue or has  
been dishonored or that there is an uncured default with  
respect to payment of another instrument issued as part  
of the same series,

25 (iv) without notice that the instrument contains an  
unauthorized signature or has been altered,

26 (v) without notice of any claim to the instrument  
described in Section 3-306, and

27 (vi) without notice that any party has a defense or claim  
28 in recoupment described in Section 3-305(a).

1 U.C.C. §3-302; *see also* *Great W. Bank & Tr. Co. v. Pima Sav. & Loan Ass’n*, 718 P.2d  
2 1017, 1019 (Ariz. Ct. App. 1986) (“A holder-in-due-course of a negotiable instrument must  
3 take the instrument for value in good faith and without notice of defenses.”). “The critical  
4 time for [determining] such notice is when the party comes into possession [of the  
5 instrument] as a holder.” *Flash & the Boys, LLC v. Samons*, No. 1 CA-CV 13-0531, 2015  
6 WL 673879, at \*6 (Ariz. Ct. App. Feb. 17, 2015). “The issue of whether a party is a holder  
7 in due course is usually one of fact, although ‘where the facts are undisputed and  
8 conclusive, a court can determine holder in due course status as a matter of law.’” *Maine*  
9 *Family Fed. Credit Union v. Sun Life Assurance Co. of Canada*, 727 A.2d 335, 340 (Me.  
10 1999) (internal edits omitted) (quoting *Triffin v. Dillabough*, 716 A.2d 605, 611 (1998));  
11 *see also* *San Tan Irr. Dist. v. Wells Fargo Bank*, 3 P.3d 1113, 1117 (Ct. App. 2000)  
12 (whether a party acted in good faith “in a particular case presents a question that ordinarily  
13 must be resolved by the fact finder”).

14 Here, no party raised questions or presented evidence indicating that the Check’s  
15 authenticity should have been called into question or that Wells Fargo took the Check with  
16 any particular notice. Ferruccio only contests whether Wells Fargo took the Check in good  
17 faith. (Resp. at 4).

18 1. Definition of “Good Faith”

19 “Good faith” is defined as “[1] honesty in fact and [2] the observance of reasonable  
20 commercial standards of fair dealing.” U.C.C. § 1-201(b)(20). The “honesty in fact” prong  
21 of the definition “is tested by a subjective standard, inquiring into the actual state of mind  
22 of the party,” while the “observance of reasonable commercial standards of fair dealing” is  
23 measured objectively. *San Tan*, 3 P.3d at 1117. Prior to 1990, the U.C.C. definition of  
24 “good faith” only required that the holder prove it acted with “honesty in fact,” and the  
25 addition of the objective prong has been met with varying interpretation by courts.

26 Ferruccio does not argue the “honesty in fact” prong of the test, but rather argues  
27 that Wells Fargo did not exercise reasonable commercial standards of fair dealing. (Resp.  
28 at 4). In doing so, Ferruccio relies entirely on *Maine Family Fed. Credit Union v. Sun Life*



1 *Assurance Co. of Canada*, a Maine Supreme Court case with relevant facts that are  
2 substantially similar to the instant case. 727 A.2d 335 (Me. 1999). In *Maine Family*, after  
3 a credit union customer deposited a check into his account at the credit union, the credit  
4 union immediately made the funds available to the customer. After the payor of the check  
5 placed a “stop payment” on the check, the check was dishonored by the drawee bank, but  
6 not before the customer had withdrawn the funds made available by the credit union. The  
7 jury found that the credit union had not acted in “good faith” by making the funds  
8 immediately available to its customer. In analyzing the “reasonable commercial standards  
9 of fair dealing” part of the test, the Maine Supreme Court determined that the “factfinder  
10 must . . . determine, first, whether the conduct of the holder comported with industry or  
11 ‘commercial’ standards applicable to the transaction and, second, whether those standards  
12 were reasonable standards intended to result in fair dealing.” *Id.* at 343. The court affirmed  
13 the judgment of the lower court, holding that “the jury could rationally have concluded that  
14 the reasonable commercial standard of fair dealing would require the placing of a hold on  
15 the uncollected funds for a reasonable period of time and that, in giving value under these  
16 circumstances, the Credit Union did not act according to commercial standards that were  
17 reasonably structured to result in fair dealing.” *Id.* at 344.

18 While some courts have agreed with *Maine Family*’s reasoning, many courts and  
19 commentators have found it faulty. *See, e.g., Choice Escrow & Land Title, LLC v.*  
20 *BancorpSouth Bank*, 754 F.3d 611, 623 n. 6 (8th Cir. 2014) (noting that “the *Maine Family*  
21 test has been criticized for conflating fair dealing with due care”); *Travelers Cas. & Sur.*  
22 *Co. of Am. v. Wells Fargo Bank N.A.*, 374 F.3d 521, 527 (7th Cir. 2004) (finding it  
23 “reasonably clear that ‘good faith,’ as the term connotes, does not include due care,” and  
24 noting that some cases, including *Maine Family*, have said it does); 1 White, Summers, &  
25 Hillman, Uniform Commercial Code U.C.C. § 1:10 (6th ed.) (commenting that *Maine*  
26 *Family* interprets the standard incorrectly and that the “rule could mean that I will not treat  
27 you less fairly than I treat others, not that I will use as much care as others”).  
28

1 Accordingly, several courts have distinguished the “reasonable commercial  
2 standard of fair dealing” from standards of negligence or due care. *See, e.g., San Tan*,  
3 3 P.3d at 1117 (noting that Plaintiff gained nothing by characterizing Defendant Bank’s  
4 “conduct as careless, because it is the fairness with which a party handles a transaction, not  
5 the care with which it does so, that is the proper focus of inquiry”); *Wachovia Bank, N.A.*  
6 *v. Fed. Reserve Bank of Richmond*, 338 F.3d 318, 323 (4th Cir. 2003) (“To determine  
7 whether Wachovia acted in conformity with reasonable commercial standards of fair  
8 dealing, we consider the fairness of Wachovia’s actions, rather than any negligence on its  
9 part.”); *Gerber & Gerber, P.C. v. Regions Bank*, 596 S.E.2d 174, 177 (2004)  
10 (“[R]easonable commercial standards of *fair dealing* are different from reasonable  
11 commercial standards of *due care*.”); *see also* 2 White, Summers, & Hillman, Uniform  
12 Commercial Code § 18:9 (6th ed.) (“[G]ood faith does not require general conformity to  
13 ‘reasonable commercial standards’ but only to ‘reasonable commercial standards of fair  
14 dealing.’”) (“The issue is one of ‘unfairness,’ not of ‘negligence.’”).

15 The Court finds U.C.C. § 3-103, official comment 4, informative on this issue,  
16 which reads in part as follows:

17 Although fair dealing is a broad term that must be defined in  
18 context, it is clear that it is concerned with the fairness of  
19 conduct rather than the care with which an act is performed.  
20 Failure to exercise ordinary care in conducting a transaction is  
21 an entirely different concept than failure to deal fairly in  
22 conducting the transaction. Both fair dealing and ordinary care,  
23 which is defined in Section 3-103(a)(9), are to be judged in the  
24 light of reasonable commercial standards, but those standards  
25 in each case are directed to different aspects of commercial  
26 conduct.

27 Accordingly, the Court will look to “the fairness with which [Wells Fargo] handle[d] [the]  
28 transaction, not the care with which it d[id] so.” *San Tan*, 3 P.3d at 1117.

1           2. Good Faith Analysis

2           Ferruccio points to the account agreement between Wells Fargo and Equa Gaming,  
3 specifically the section referencing that “Longer Delays May Apply.” (Resp. at 4–5)  
4 (citing Doc. 61-4). The agreement states, in part, that

5                     [i]n some cases, the Bank will not make all of the funds that  
6                     you deposit by check available to you on the first *Business Day*  
7                     after the day of your deposit. Depending on the type of check  
8                     that you deposit, funds may not be available until the fifth or  
9                     sixth *Business Day* after the day of your deposit . . . . In  
10                    addition, funds you deposit by check may be delayed for a  
                      longer period under the following circumstances: . . . You  
                      deposit checks totaling more than \$5,000 on any one day

11           (Resp. at 4–5); (Doc. 61-4). Ferruccio states that “[b]y the terms of Plaintiff’s own account  
12           agreement, the stated process would have been to delay the availability of the deposited  
13           funds because the amount of the deposit was significantly above the \$5,000 threshold.”  
14           (Resp. at 5). However, as Wells Fargo points out, the referenced sections of the agreement  
15           do not state that Wells Fargo will always delay availability, but that they “may” do so.  
16           (Reply at 5). Wells Fargo also points to the “General” policy regarding availability of  
17           funds: “The Bank’s policy is to make funds from your check deposits to your checking and  
18           savings Accounts . . . available to you on the first Business Day after the day the Bank  
19           receives your deposit.” (Reply at 5); (Doc. 61-4). Ferruccio, like the court in *Maine*  
20           *Family*, is conflating “good faith” with “due care.”

21           As such, Ferruccio does not point to anything in the record indicating that Wells  
22           Fargo was required to place a hold. Nor does Ferruccio point to anything in the record  
23           indicating that Wells Fargo acted in an “unfair” manner. Wells Fargo notes that it  
24           “accepted the Check for processing in the ordinary course,” citing an affidavit from Wells  
25           Fargo employee Cynthia Bennett-Parks. (Reply at 5) (citing Doc. 55-1, Ex. A). In the  
26           affidavit, Ms. Bennett-Parks further describes that the Check was deposited into the  
27           Account on Saturday, March 12, 2016, and that the Check bore no “evidence of forgery or  
28           alteration and was not incomplete or irregular in any respect.” (Doc. 55-1 at 3–4). Ms.

1 Bennet-Parks also states that Wells Fargo had no notice that the Check had been dishonored  
2 or “that any party had a defense or claim in recoupment.” *Id.* at 4.

3 Accordingly, the Court finds that Wells Fargo acted in “good faith” and therefore is  
4 considered a *holder in due course* of the Check.

#### 5 **D. Security Amount**

6 Ferruccio also argues that Wells Fargo’s security interest cannot exceed \$75,278.39,  
7 the amount that the Equa Gaming account was overdrawn. (Resp. at 6). Ferruccio cites to  
8 U.C.C. § 3-302(e) and asserts that “[a]ny existing security interest claimed by the Plaintiff  
9 is limited to the amount of Check, less any rightful set-offs and deductions,” and that  
10 “[c]ases addressing this issue have also held that the obligation of the Drawer who stops  
11 payment on a check is limited to the overdrawn balance on the depositor’s account.” (Resp.  
12 at 5–6).

13 In reply, Wells Fargo argues that (1) U.C.C. § 3-302(e) does not apply because  
14 Ferruccio has no defense, claim in recoupment, or claim to the instrument, (2) Wells Fargo  
15 obtained a “security interest in the Check to the extent of the advance to the Account,” and  
16 (3) “the drawer of an instrument is liable to the holder for the amount of the instrument.”  
17 (Reply at 6–7).

18 First, section 3-302(e) provides that “the person entitled to enforce the instrument  
19 may assert rights as a holder in due course only to an amount payable under the instrument  
20 which, at the time of enforcement of the instrument, does not exceed the amount of the  
21 unpaid obligation secured,” but only if (1) “the person entitled to enforce an instrument has  
22 only a security interest,” and (2) “the person obliged to pay the instrument has a defense,  
23 claim in recoupment, or claim to the instrument that may be asserted against the person  
24 who granted the security interest.”

25 As noted above, Ferruccio’s defense fails. And Ferruccio has not asserted any  
26 claims in recoupment or claims to the instrument. Accordingly, U.C.C. § 3-302(e) does  
27 not apply here.  
28

1           Second, Wells Fargo asserts that they obtained a “security interest in the Check to  
2 the extent of the advance to the Account.” (Reply at 6) (citing *In re Consolidated Pioneer*  
3 *Mortg. Entities*, 211 B.R. 704, 711 (S.D.Cal. 1997)). Wells Fargo argues that it provided  
4 provisional credit of \$100,000 to the Account, and after the credit was reversed, “the  
5 Account was negative in an amount exceeding \$100,000.” (Reply at 6).

6           According to U.C.C. §4-210(a), “[a] collecting bank has a security interest in . . . an  
7 item deposited in an account [] to the extent to which credit given for the item has been  
8 withdrawn or applied.” In *In re Consol. Pioneer Mortg. Entities*, the court stated that “[i]f  
9 the customer only draws against a portion of the available provisional credit, the bank only  
10 has a security interest to the extent that the customer has withdrawn uncollected funds.”  
11 211 B.R. at 711; *see also Braden Corp. v. Citizens Nat. Bank of Evansville*, 661 N.E.2d  
12 838, 841 (Ind. Ct. App. 1996) (bank allowed customer to withdraw provisional credit and  
13 “acquired a security interest in the proceeds of the check to the extent of the withdrawn  
14 funds”).

15           The Account statement, (Doc. 55-1, Ex. D), does show that on the day the \$100,000  
16 credit was reversed, the ending balance of the account was a negative balance in excess of  
17 \$100,000. However, the next day the negative balance was no longer over \$100,000 due  
18 to the reversal of recent debits on the Account. And at the time the account was closed,  
19 the ending balance was negative \$75,278.39. (Resp. at 6) (Doc. 55-1, Ex. D). If Wells  
20 Fargo were able to recover for the total amount of the provisional credit, as opposed to the  
21 amount for which the Account was ultimately overdrawn, the result would essentially allow  
22 Wells Fargo to receive more than the credit that was “withdrawn.”

23           Lastly, Wells Fargo argues that Ferruggio is liable for the amount of the instrument.  
24 (Reply at 6). Ferruggio cites two cases for the proposition that courts have “held that the  
25 obligation of the Drawer who stops payment on a check is limited to the overdrawn balance  
26 on the depositor’s account.” (Resp. at 6) (citing *Falls Church Bank v. Wesley Heights*  
27 *Realty, Inc.*, 256 A.2d 915, 916 (D.C. 1969)) (citing *Maine Family*). In similar cases,  
28 plaintiff banks regularly request and are awarded the amount of the dishonored check,

1 minus subsequent adjustments reducing the bank's overall loss. *See, e.g., Commerce Bank*  
2 *of Univ. City v. EDCO Fin. Servs.*, 379 F. Supp. 293, 294 (E.D. Mo. 1974), *aff'd*, 503 F.2d  
3 1047 (8th Cir. 1975) (plaintiff bank recovered the amount of the dishonored checks, minus  
4 "all other sums subsequently deposited in the subject accounts"); *Falls Church*, 256 A.2d  
5 at 916) (plaintiff bank recovered only the amount overdrawn by customer); *Maine Family*,  
6 727 A.2d at 337, 346 (after credit union was able to partially recover overdrawn funds from  
7 customer, credit union recovered the remaining amount lost from the drawer of the checks);  
8 *First of Am. Bank-Ne. Illinois, N.A. v. Bocian*, 614 N.E.2d 890, 891 (Ill. App. Ct. 1993)  
9 (plaintiff bank requested and received only the amount that customer's account became  
10 overdrawn, not the full amount of the original dishonored check); *Dempsey v. Etowah*  
11 *Bank*, 418 S.E.2d 418, 419 (Ga. Ct. App. 1992) (plaintiff bank requested and was awarded  
12 the amount the account was overdrawn).

13 In this case, due to subsequent reversals of checks and debits, Wells Fargo has not  
14 lost the entire amount of the dishonored Check. Wells Fargo asserts that in the event that  
15 recovery of the full value of the Check results in a positive balance on the Account, Wells  
16 Fargo has a contractual agreement with Carrillo and Equa Gaming "to offset the balance  
17 for other debts owed to it by Equa Gaming and Carillo," and that "[u]nder a different factual  
18 scenario, a reduction in the amount recovered from the maker of the Check might be  
19 appropriate." (Reply at 7).

20 A separate agreement between Wells Fargo and the Account holders does not give  
21 the Court reason to award Wells Fargo more than it lost due to the dishonored Check. Any  
22 ancillary debts owed by the Account holders is not relevant to the question at hand. Given  
23 that there are no material facts regarding the amount that the Account was finally  
24 overdrawn, the Court finds that Wells Fargo can recover the amount of their security  
25 interest, \$75,278.39, "the extent to which credit given for the item has been withdrawn."  
26 Accordingly, **IT IS ORDERED** that:

- 27 1. The motion for summary judgment as to defendant Ferruccio on Count I is  
28 **GRANTED.**

1 2. Ferruccio is liable to Wells Fargo in the amount lost by Wells Fargo, \$75,278.39

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3 Dated this 14th day of January, 2019.

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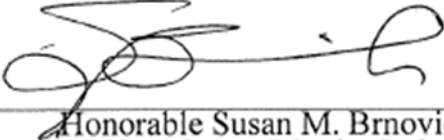
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Honorable Susan M. Brnovich  
United States District Judge